No. 17-965

In The
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS,

v.

STATE OF HAWAII, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERFAITH GROUP OF RELIGIOUS AND INTERRELIGIOUS ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

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BRIEF FOR INTERFAITH GROUP OF RELIGIOUS AND INTERRELIGIOUS ORGANIZATIONS AS AMICI CURIAE SUPPORTING RESPONDENTS

Amici curiae, an interfaith group of religious and interreligious organizations, respectfully submit this brief in support of respondents.[1]

INTEREST OF AMICI CURIAE

Amici are a diverse group of more than forty faith-based and interfaith religious and interreligious associations, congregations, and organizations pursuing their respective faiths alongside each other and standing for the right of all believers to practice their religions, as guaranteed by the First Amendment. Together, Amici represent tens of millions of people who have a wide array of beliefs and come from different faith traditions. Amici speak with one voice to urge the Court to affirm the court of appeals' judgment and to hold that Prociamation No. 9645 is unlawful.

Amici's interest in this case is twofold. First, Amici are united in their belief that nationality-based discrimination is repugnant to our Nation's values and to the equal dignity of all men and women. Decades ago—and at the urging of faith leaders—Congress endorsed

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[1] No counsel for a party authored this brief in whole or in part, and no person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission. Petitioners granted blanket consent for the filing of amicus curiae briefs. A letter from counsel for respondents consenting to the filing of this brief has been filed with the Clerk.

this principle by prohibiting nationality-based discrimination. Amici seek to ensure that the President cannot singlehandedly override this core anti-discrimination law. Congress, not the President, has the authority to set policies governing the admission of foreigners, and the government's suggestion that the President has inherent authority to exclude large classes of foreigners is inimical to the separation of powers and to the rule of law.

Second, Amici have a strong interest in this case because the Proclamation harms them and their right to practice their faiths. Although the Proclamation is ostensibly a nationality-based ban, it is focused by design on citizens of majority-Muslim nations. Amici therefore see it for what it is: anti-Muslim discrimination. As practitioners of multiple and diverse faiths, Amici have a strong interest in ensuring that the government neither favors nor discriminates against members of any faith. All religious people in this Nation depend on the right to practice their faith free from discrimination. When religion-based discrimination is permitted—especially when propagated at the highest levels of government—the free-exercise right of members of all faiths is threatened.

Amici curiae are as follows:

Alliance of Baptists

American Baptist Churches—USA

American Jewish World Service

Avodah

Clergy and Laity United for Economic Justice

Congregation of Our Lady of Charity of the Good Shepherd, U.S. Provinces

Disciples Home Missions, Christian Church (Disciples of Christ)

Franciscan Action Network

Franciscans for Justice

Friends Committee on National Legislation

General Synod of the United Church of Christ

Interfaith Alliance

Interfaith Worker Justice

Islamic Circle of North America—Council for Social Justice

Islamic Relief USA

Leadership Conference of Women Religious

Missionary Servants of the Most Holy Trinity

Multifaith Alliance for Syrian Refugees

National Advocacy Center of the Sisters of the Good Shepherd

National Council of Churches

National Council of Jewish Women

National Justice for Our Neighbors

NETWORK Lobby for Catholic Social Justice

North Carolina Council of Churches

Reconstructionist Rabbinical Association

Reverend J. Herbert Nelson, II, Stated Clerk of the General Assembly of the Presbyterian Church USA[2]

School Sisters of St. Francis

Sisters of St. Francis of Clinton, Iowa

Sisters of St. Francis of Penance and Christian Charity, Sacred Heart Province and St. Francis Province

Sisters of the Holy Names, U.S.-Ontario Province

Sisters of St. Francis of Philadelphia

Sound Vision Foundation

Southwest Conference of the United Church of Christ

Tanenbaum

T'ruah: The Rabbinic Call for Human Rights

Union Theological Seminary

Unitarian Universalist Association

Unitarian Universalist Service Committee

United Methodist Women

UNITED SIKHS

Women's Alliance for Theology, Ethics and Ritual

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[2] The General Assembly does not claim to speak for all Presbyterians, nor are its policies binding on the membership of the Presbyterian Church. However, the General Assembly is the highest legislative and interpretive body for the denomination, and it is the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. Amici recognize two core truths about our Nation's immigration laws: Congress has the authority under the Constitution to make those laws, and Congress has determined that exclusions based on nationality are an invidious form of discrimination. The President's Proclamation is irreconcilable with both of those principles.

The Constitution vests Congress with the authority to regulate foreign commerce and to "establish a uniform rule of naturalization." U.S. Const. art. I, § 8, cl. 3, 4. From the Founding through the present day, these powers have been understood to mean that Congress has exclusive authority to determine which foreigners may be excluded from the Nation's borders. Several decades ago, Congress exercised that authority to forbid discrimination in the issuance of immigrant visas on the basis of nationality. *See* 8 U.S.C. § 1152(a)(1)(A). This civil-rights statute was designed to end the country's long and regrettable history of nationality-based exclusions and quota systems, which were often driven by invidious stereotypes about people of other races, ethnicities, and faiths.

By singlehandedly reinstituting the exclusion of foreigners based on their nationalities, the President's Proclamation flouts both the separation of powers and Congress's express will. The statute upon which the government principally relies in defending the Proclamation, 8 U.S.C. § 1182(f), cannot be read to give the

President the sweeping power that the government asserts. The government's argument fails in light of the statutory framework, the provision's legislative history, prior executive practice, and the separation-of-powers concerns that would arise were the law given the expansive reading urged by the government. *See* Pet. App. 25a-42a. The Founders intended, and this Court's early decisions recognized, that Congress alone is authorized to make policy regulating the entrance of foreigners. This Court should not infer that Congress would readily sign away that authority in the wholesale fashion claimed by the government. In particular, it should not infer that Congress has permitted the President to enact nationality-based exclusions with the stroke of a pen when, through express legislation, Congress disavowed that very practice.

II. The Proclamation is unlawful for another reason: It intentionally discriminates against members of the Muslim faith. Amici, who come from a wide range of faith traditions, are acutely aware that when the United States government carries out official acts that are motivated by religious animus, it harms people of all faiths. The Proclamation is such an act—the result of the President's long-stated objective to exclude Muslims from entering this Nation. The Proclamation offends the very notion of the United States "as a refuge of religious tolerance" for people of all faiths. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1153 (10th Cir. 2013) (Gorsuch, J., concurring), *aff'd*, 134 S. Ct. 2751 (2014).

The Establishment Clause's central purpose is to protect religious liberty by prohibiting the government from picking and choosing among faiths, or from singling out any one faith for disfavor. The Proclamation contravenes that purpose. It directly harms Muslims not only by restricting travel rights but also by officially singling out Muslims as a disfavored group. In so doing, the Proclamation harms members of all faiths as beneficiaries of this Nation's commitment to religious free exercise.

The decision of the Ninth Circuit should be affirmed, and the Proclamation should be held unlawful in its entirety.

ARGUMENT

I. NEITHER THE CONSTITUTION NOR ANY STATUTE GIVES THE PRESIDENT UNFETTERED AUTHORITY TO EXCLUDE FOREIGNERS BASED ON THEIR NATIONALITY

A. Congress Has Exclusive Authority To Make Policies Governing The Entrance Of Foreigners

This Court has long held that the authority to formulate "[p]olicies pertaining to the entry of aliens and their right to remain here * * * is entrusted exclusively to Congress." *Galvan v. Press*, 347 U.S. 522, 531 (1954). Indeed, that proposition "has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Ibid.*; *see also, e.g., Arizona v. United States*, 567 U.S. 387, 399

(2012) (this field is "regulated by [Congress's] exclusive governance"). "[O]ver no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (internal quotations omitted). That is for good reason. The text of the Constitution, early statutes enacted by Congress, and early case law all make clear that the authority to regulate the admission and exclusion of aliens rests exclusively with Congress.

1. The Constitution grants Congress the exclusive power to regulate the admission of foreigners

The Constitution vests Congress—not the President—with the authority to set policy governing the admission of aliens. Among its enumerated powers, Congress has the authority "[t]o regulate commerce with foreign nations" and "[t]o establish a uniform rule of naturalization." U.S. Const. art. I, § 8, cl. 3, 4. These two clauses delegate to Congress the power to regulate both the admission and the naturalization of foreigners.

The Court has long recognized that the Foreign Commerce Clause encompasses the power to regulate the transport and admission of foreign passengers arriving by sea. *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849). As such, the Court has invalidated on preemption grounds state and local laws that attempted to tax or restrict the entrance of these immigrants and visitors. *Id.*; *see also Chy Lung v. Freeman*, 92 U.S. 275

(1875); *Henderson v. Mayor of the City of New York*, 92 U.S. 259 (1875). As the Court explained in *Henderson*, "[a] law or a rule * * * which prescribes terms or conditions on which alone [a] vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations." 92 U.S. at 271. That is "a subject-matter which has been confided *exclusively* to the discretion of Congress by the Constitution." *Ibid.* (emphasis added); *see also Chy Lung*, 92 U.S. at 280.

That authority to regulate the arrival of foreigners comes from the Foreign Commerce Clause is significant. To start, it means that the regulation of immigration is a matter entrusted to the federal government (as opposed to the States). *See, e.g., Arizona*, 567 U.S. 387. More importantly for present purposes, however, it means that the authority to regulate the arrival and initial entry of foreigners is an Article I power *of Congress*.

So too with the Naturalization Clause. Sources from the Founding explain why the Constitution granted Congress the power to regulate the naturalization of aliens: Under the Articles of Confederation, States had different laws governing requirements for citizenship. *See, e.g.*, N.C. Const., art. XL (Dec. 18, 1776); N.Y. Const., art. XLII (Apr. 20, 1777); Pa. Const., § 42 (Sept. 28, 1776); Vt. Const., Ch. II, § 38 (July 8, 1777). At the same time, however, States were required to afford reciprocal rights to free inhabitants and citizens of other States. The Constitution was designed to

address this "defect of the Confederation * * * by authorizing the general government to establish a uniform rule of naturalization throughout the United States." The Federalist No. 42, at 218 (James Madison) (Shapiro ed., 2009). And that power was not vested in the "general government" as a whole—as Hamilton explained, the Naturalization Clause "declares that *Congress* shall have power 'to establish a[ ] *uniform rule* of naturalization,'" a power that "must necessarily be exclusive." The Federalist No. 32, at 156 (Alexander Hamilton) (Shapiro ed., 2009) (second emphasis in The Federalist); *see also* 2 Joseph Story, *Commentaries on the Constitution* §§ 1102-04 (Cooley ed., 4th ed. 1873) (photo. reprint 2008).

The Founders understood that Congress's ability to make naturalization laws would affect immigration policy more broadly. In formulating the Nation's first naturalization law, for example, members of Congress debated over which set of requirements would "gain the maximum advantage from immigration with the least harm or danger to republican government and institutions." Frank George Franklin, *The Legislative History of Naturalization in the United States* 38 (1906). The statute ultimately enacted provided that any free white person who resided in the United States for two years or more could apply to become a citizen. An Act to Establish An Uniform Rule of Naturalization, Mar. 26, 1790, 1 Stat. 103. Congress modified these rules by enacting new naturalization laws in the ensuing years. *See, e.g.*, Act of Jan. 29, 1795, 1 Stat. 414; Act of Apr. 14, 1802, 2 Stat. 153; Act of

May 16, 1824, 4 Stat. 310. Because no other laws at the time restricted the initial entry of foreigners, these congressionally-enacted naturalization laws effectively served as the federal government's first set of immigration policies.

2. *Congress's early delegations of authority were narrow and specific*

Congress throughout the Nation's early history acted as the sole organ for setting policy governing the entrance and naturalization of foreigners, delegating little or no authority to the executive branch. These early enactments provide "contemporaneous and weighty evidence of the Constitution's meaning." *Alden v. Maine*, 527 U.S. 706, 743-744 (1999) (internal quotations omitted). With respect to the initial entry of foreigners, Congress did not enact any restrictions in the first several decades after the Founding. Rather, "[t]o encourage foreign emigration was a cherished policy of this country at the time the Constitution was adopted." *The Passenger Cases*, 48 U.S. (7 How.) at 401 (opinion of McLean, J.). As such, early laws pertaining to arriving immigrants were generally "passed * * * to facilitate and encourage" their arrival "for the purpose of settlement and residence." *Id.* at 440 (opinion of Catron, J.). For example, a 1799 statute governing the collection of customs and duties exempted personal articles carried by immigrants from duties required to be paid upon arrival in a port. *Ibid.*; *see* Act of Mar. 2, 1799 § 46, 1 Stat. 627. Statutes such as this provided little room for executive discretion; they described in minute detail the tasks to be performed by

customs inspectors and the types of items requiring inspection, and they even included samples of the paperwork required to accompany imported packages. *Id.* §§ 21-23.

Indeed, the only immigration-related role Congress delegated to the executive branch near the time of the Founding involved the emergency authorities conferred by the Alien Friends Act and Alien Enemy Act of 1798. 1 Stat. 570; 1 Stat. 577. The former, which allowed the President to remove individual aliens judged "dangerous to the peace and safety of the United States," expired after a two-year sunset period. Alien Friends Act §§ 1, 6. The latter, which applied only in times of declared or impending war or during an "invasion" or "predatory incursion" by another country, allowed the President to render military-aged males from hostile nations subject to removal or restrictions. Alien Enemy Act § 1. Neither statute, however, allowed the President to bar aliens from initial entry into the United States.

The executive branch played no other significant role in the field of immigration law until Congress enacted a statute in 1864 that was broadly designed to encourage immigration. Act of July 4, 1864, 13 Stat. 385 ("1864 Act"). President Lincoln had urged Congress to facilitate the flow of foreigners into the United States to alleviate the "great deficiency of laborers in every field of industry" that resulted from the Civil War. Cong. Globe, 38th Cong., 1st Sess. 856 (1864) (statement of Rep. Donnelly) (quoting message from President Lincoln to Congress). Congress accordingly

enacted a law permitting the President to appoint a Commissioner of Immigration within the State Department who could set regulations governing contracts entered into by immigrants for payment of their passage to the United States. 1864 Act §§ 1, 2. The law also established a United States Emigrant Office in New York City, to be headed by a federal superintendent of immigration.[3]

Once Congress began taxing and restricting immigration, its delegations of authority were similarly tailored. The first such restrictions, enacted in 1875, prohibited the entry of convicts, women "imported for the purposes of prostitution," and laborers from Asia whose service was involuntary. Act of Mar. 3, 1875, 18 Stat. 477. The statute was to be enforced by consular officials conducting inspections at ports of departure and by customs collectors at ports of arrival. *Id.* §§ 1, 5. Congress subsequently established an "immigrant fund" within the Department of the Treasury, which would be supplied by a tax levied on each arriving immigrant. Act of Aug. 3, 1882, 22 Stat. 214. The Secretary of the Treasury was authorized to spend these funds "for the support and relief" of immigrants who "may fall into distress" and to enforce other provisions of the statute. *Id.* § 2.

In accordance with this understanding of delegated authority, case law from this period likewise explained the role of the executive branch as limited

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[3] The statute was repealed three years later. *See* Act of Mar. 30, 1868 § 4, 15 Stat. 56.

to (i) executing laws enacted by Congress and (ii) entering into treaties subject to the advice and consent of the Senate. *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893) ("The power to exclude or expel aliens * * * is to be regulated by treaty or by act of [C]ongress, and to be executed by the executive authority according to regulations so established"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) ("The supervision of the admission of aliens into the United States may be *[e]ntrusted by [C]ongress* either to the department of state, having the general management of foreign relations, or to the department of the treasury, charged with enforcement of the laws regulating foreign commerce." (emphasis added)).

B. Only Congress Has The Authority To Exclude Entire Nations—And It Has Expressly Disavowed That Practice

Congress has actively exercised its exclusive authority over immigration with respect to nationality-based exclusions in particular. Regrettably, for many years the legislation it enacted created and maintained a nationality-based quota system and excluded immigrants from some nations altogether. But Congress later changed course and expressly prohibited nationality-based exclusion. Pub. L. No. 89-236 § 2 (1965), codified at 8 U.S.C. § 1152(a)(1)(A). Throughout this entire period—from the enactment of the Chinese-exclusion laws and the quota systems through Congress's disavowal of nationality-based discrimination—the President has never been thought to possess

his own parallel authority to promulgate nationality-based exclusions.

1. Congress has repudiated nationality-based exclusions

One of the most infamous chapters in our Nation's immigration history involved the Chinese-exclusion laws enacted in the late nineteenth century. Initially, treaties entered into between the United States and China facilitated the flow of trade between the two nations and provided for the protection of citizens of each country who visited or resided in the other. *See Chae Chan Ping v. United States*, 130 U.S. 581, 590-593 (1889). But as more Chinese migrants settled on the west coast, a backlash grew. California lawmakers argued that Chinese migration "was in numbers approaching the character of an Oriental invasion, and was a menace to our civilization." *Id.* at 595. They urged Congress to act, and, following a modification of the treaty, Congress enacted a law suspending the entrance of Chinese laborers. *Id.* at 596-597; *see* Act of May 6, 1882, 22 Stat. 58.

Subsequent legislation effectively expelled any Chinese immigrant who attempted to depart from and then return to the United States and made it increasingly difficult for Chinese immigrants to maintain their residence. *See* Act of July 5, 1884, 23 Stat. 115 (requiring Chinese laborers to obtain a certificate in order to be permitted to reenter the United States); Act of Oct. 1, 1888, 25 Stat. 504 (prohibiting any Chinese laborer residing in the United States from returning

after any departure, and voiding all certificates for reentry); Act of May 5, 1892, 27 Stat. 25 (rendering all Chinese laborers presumptively deportable upon arrest; requiring all Chinese laborers to acquire a certificate of residence; and rendering all Chinese laborers deportable if they lacked such a certificate, unless able to prove prior residence with the testimony of "one credible white witness"); *see also Chae Chan Ping*, 130 U.S. at 596-599; *Fong Yue Ting*, 149 U.S. at 725-728 (describing these statutes).

Congress then expanded on the Chinese-exclusion laws by creating an "Asiatic Barred Zone," which served to exclude immigrants from throughout Asia. Act of Feb. 5, 1917, § 3, 39 Stat. 874 (1917). It enacted further nationality-based restrictions through the so-called quota laws of the 1920s. First, the Emergency Quota Act of 1921 restricted the number of immigrants from any country annually (with certain exceptions) to three percent of the number of nationals from that country present in the United States at the time of the 1910 census. Pub. L. No. 67-5 § 2, 42 Stat. 5. While initially enacted as a temporary measure, this quota system became entrenched through the Immigration Act of 1924, which (again with certain exceptions) capped the annual number of immigrants from any country at fixed ratios based on the U.S. population of such residents. Pub. L. No. 68-139 § 11, 43 Stat. 153. The clear objective of these laws was to exclude immigrants from southern and eastern Europe and to "preserve, as nearly as possible, the racial status quo of the United States." H.R. Rep. No. 68-350, at 15 (1924); *see*

also H.R. Rep. No. 89-745, at 3 (1965) (purpose of quota laws was "to maintain * * * the ethnic composition of the American people").

Decades later, Congress exercised its exclusive authority over nationality-based limitations on immigration in a fundamentally different way, by disavowing this legacy of nationality-based exclusions and quota laws. In 1965, it enacted what is now 8 U.S.C. § 1152(a)(1)(A), which states that "[e]xcept as specifically provided * * *, no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." Pub. L. No. 89-236 § 2.[4] The purpose of this legislation was "the elimination of the national origins system as the basis of the selection of immigrants to the United States." H.R. Rep. No. 89-745, at 8 (1965).

As the House noted in its report, the past four Presidents—Truman, Eisenhower, Kennedy, and Johnson—had all objected to the quota-based system because it "d[i]scriminate[d], deliberately and intentionally, against many peoples of the world" (President Truman); did not "reflect[] principles of equality and human dignity" (President Kennedy); and served to "disparage the ancestors of millions of our fellow Americans" (President Johnson). H.R. Rep. No. 89-745,

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[4] The statute contains limited exceptions, including certain preferences that may apply in limited circumstances and a cap on the annual percentage of immigrant visas that may be issued for nationals from any one foreign state in a given year. *See* 8 U.S.C. §§ 1101(a)(27)(F), 1152(a)(2), 1153(c).

at 10-11 (1965). The elimination of the quota system thus served as a clear repudiation of laws that had been based on generalizations and stereotypes and had failed to treat immigrants as individuals.

This long-overdue measure was also supported by a number of faith groups that recognized the fundamental injustice of nationality-based exclusions and restrictions. Faith leaders condemned these laws as "in sharp contradiction to our claims of championing the equality and dignity of all men"; a "negat[ion] [of] one of our most precious principles—support for equality of opportunity"; a "violat[ion] [of] everything for which America stands"; and a "den[ial] to persons desiring to enter a nation from other lands the respect and justice due to all men." *To Amend the Immigration and Nationality Act: Hearing Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 89th Cong. 751 (1965) (statement of Donald E. Anderson, Director, Lutheran Immigration Service); *id.* at 778 (statement of Richard F. Smith, American Friends Service Committee, Friends Committee on National Legislation); *id.* at 965 (statement of George J. Charles, President, Board of Trustees, St. Sophia Greek Orthodox Cathedral); *id.* at 979 (statement of Herman Will, Jr., Division of Peace and World Order, General Board of Christian Social Concerns of the Methodist Church).[5]

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[5] *See also id.* at 740-745 (statement of James P. Price, Executive Director, United HIAS Service); *id.* at 801-805 (statement of Edward E. Swanstrom, Honorary Chairman, American Council of Voluntary Agencies for Foreign Service and Executive Director of the Catholic Relief Service); *id.* at 1006-1007 (statement of Bruce

The 1965 legislation placed nationality on the list of invidious bases of discrimination that may not be considered in the issuance of immigrant visas, along with race and sex. 8 U.S.C. § 1152(a)(1)(A). Nearly one hundred years after enacting the first Chinese-exclusion law, Congress closed this chapter of the Nation's history by conclusively rejecting national origin as a basis for excluding foreigners.

2. *The President's delegated authority to exclude foreigners has been limited to narrow classes and circumstances*

As odious as these nationality-based exclusion laws were, it was clear that Congress—not the executive branch—was responsible for them. Their very enactment negates the suggestion that the President alone could have excluded nationals from China or any other country unilaterally—notwithstanding the panicked sentiment at the time, which viewed Chinese immigration as "dangerous to [the United States'] peace and security." *Chae Chan Ping*, 130 U.S. at 606. It was Congress that was prevailed upon, repeatedly, to address these so-called problems. And Congress was meticulous and precise about the exclusions and quotas that it set. *See, e.g.*, Immigration Act of 1924 §§ 11(a)-(b) (prescribing quota

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M. Mohler, Director, Department of Immigration, National Catholic Welfare Conference); *id.* at 1007-1009 (statement of Robert E. Jones, Legislative Representative, Department of Social Responsibility, Unitarian Universalist Association).

formulas); *id.* §§ 11(c), (e), 12 (prescribing means for determining national origins and nationality).

Indeed, the President's authority to remove or exclude aliens has always been expressly delegated by Congress. And for the first 150 years of our Nation's history, delegations of that authority were limited to times of war or other exigencies. As noted previously, the Alien Enemy Act contained such limitations; and even the Alien Friends Act applied only if an alien posed a particularized risk to public safety. *See supra* at 12.

During World War I, Congress enacted the law that preceded Sections 1182(f) and 1185(a). Act of May 22, 1918, 40 Stat. 559. This statute, which applied only "when the United States is at war," allowed the President to impose restrictions on the entry or departure of aliens "if the President shall find that the public safety requires" such restrictions. The law was specifically designed to prevent spies and other hostile actors from entering the United States. *See* 56 Cong. Rec. 6192 (1918) (statement of Sen. Shields) ("The chief object of this bill is to correct a very serious trouble which the Department of State, the Department of Justice, and the Department of Labor are having with aliens and alien enemies and renegade American citizens * * * entering the United States from nests they have in Cuba and over the Mexican border."). Congress amended the statute in 1941, when it was again designed to address the exigencies of the war. Act of June 21, 1941, 55 Stat. 252 (allowing the

President to exclude aliens if he finds that "the interests of the United States" require it).

These World War I and World War II measures were never thought to allow broad nationality-based exclusions for national-security reasons. To the contrary, the only law that addressed—and still addresses—the presence of foreigners from hostile nation-states is the Alien Enemy Act, now codified at 50 U.S.C. § 21; *see, e.g.*, *Ludecke v. Watkins*, 335 U.S. 160 (1948). And even the Alien Enemy Act has never been invoked to allow the wholesale exclusion of all foreigners from a particular nation.

In 1952, Congress enacted what is now Section 1182(f), allowing the President without a textual wartime limitation to exclude aliens if he finds that their entry would be "detrimental to the interests of the United States." Pub. L. No. 82-414, § 212(e). But the very structure of this provision—which follows a detailed list of 31 different grounds for removal, *id.* § 212(a)—negates the suggestion that it can be invoked unilaterally by the President to exclude entire nations. Instead, Section 1182(f) was intended to address specific types of potential exigencies, whether during wartime or otherwise. *See* Hawaii Br. 36-37, 40. And it is unimaginable that Congress would have granted the President such unfettered authority to exclude entire nations in the very same statute in which it provided, for the first time, that immigrants could not be denied the right to naturalization based on race. Pub. L. No. 82-414, § 311; S. Rep. No. 82-1137, at 40

(1952) (measure intended to end "an outmoded and un-American concept").

In short, statutes delegating authority to the President to exclude foreigners have been rooted in emergency provisions. And to the extent Congress has specifically allowed the President to remove aliens based on their nationality, it has done so *only* as a wartime or emergency measure.

C. The Proclamation Is Incompatible With The Separation Of Powers And With Congress's Express Will

The President's Proclamation tramples on the demarcation of authority between Congress and the executive branch. The Proclamation imposes nationality-based exclusions against all or substantially all nationals of Chad, Libya, Syria, and Yemen. Pet. App. 11a-13a. Iranian nationals are also banned with the exception of those traveling under student and exchange visitor visas, and Somali nationals may not enter as immigrants. *Id.* at 12a-13a.[6] The government's argument in support of such sweeping authority boils down to a claim that—notwithstanding Congress's constitutionally prescribed role of determining which foreigners are admissible and its unbroken practice of closely guarding that authority—Congress effectively left the President a blank check to exclude entire nations in Sections 1182(f) and 1185(a). This argument

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[6] The Proclamation also restricts entry of nationals from North Korea and certain Venezuelan nationals; those provisions are not challenged here. Pet. App. 3a n.1.

turns the allocation of authority between Congress and the President on its head; misconstrues the relevant statutes; and violates Congress's express will.

1. The President does not have inherent authority to set broad policies for the exclusion of foreigners

First, undergirding many of the government's statutory arguments (discussed further below) is the suggestion that the President has "inherent" authority to exclude large classes of foreigners—including entire nations—from the United States. U.S. Br. 2, 45. Indeed, the government goes so far as to argue that a restrictive interpretation of the President's statutory authority to exclude aliens would create "grave constitutional questions" by "undermin[ing] the President's Article II authority." *Id.* at 54. But this gets matters precisely backward: it is the *government's* reading of the law that would create grave constitutional questions by arrogating sweeping authority to the President over a subject that is reserved to Congress.

As an initial matter, the government's arguments notably lack support from the text of Article II. The government alludes generally to the President's authorities as Commander-in-Chief and "his power over foreign affairs." Br. 54. But the government fails to account for the far more specific text of Article I, which gives Congress the authority to regulate foreign commerce and to create uniform rules governing naturalization. Indeed, this Court has *specifically construed* the Foreign Commerce Clause as granting Congress

exclusive authority to regulate immigration. *See supra* at 8-9. By contrast, the only relevant textual authorities exclusively committed to the President under Article II are the powers to command the military and to appoint and receive ambassadors.

Rather than having any grounding in the text of the Constitution, the government's notion of inherent executive authority instead relies almost exclusively on *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950). U.S. Br. 45-47. In *Knauff*, the Court held (by a four-to-three majority[7]) that a predecessor statute to 8 U.S.C. §§ 1182(f) and 1185(a)(1) was not an unconstitutional delegation of authority to the executive branch because the right to exclude aliens "stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation." 338 U.S. at 542. The government would therefore read *Knauff* as permitting—or indeed supporting—near-unlimited delegations of discretion to the President. But *Knauff* is distinguishable in several critical respects.

First, the *Knauff* Court emphasized that the measures at issue—including a regulation that allowed for the exclusion of aliens without a hearing—applied "only when the United States is at war or during the existence of [a] national emergency." *Id.* at 544-545; *see also id.* at 543 ("Congress may in broad terms authorize the executive" to exclude aliens "for the best interests of the country during a time of

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[7] Two Justices did not take part in consideration of the case. Justices Frankfurter, Jackson, and Black dissented.

national emergency").[8] The government similarly emphasized in its brief in *Knauff* that the challenged measures were limited to times of war and that Congress could make broader delegations of authority to the executive branch during wartime. Br. for U.S. 44-51, *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950) ("*Knauff* Brief").

Second, *Knauff* arose in the context of a decision by the Attorney General to exclude a particular individual for security reasons. *See* 338 U.S. at 539-540. Indeed, the specific question before the Court concerned the government's chosen *procedure* for excluding the petitioner: She argued that she was entitled to a hearing, and the government defended a regulation permitting the Attorney General to deny such a hearing "in special cases" if he concluded that the grounds for the exclusion relied upon "information of a confidential nature." *Id.* at 541. The government did not remotely suggest that the President possesses sweeping authority to exclude large classes of foreigners. To the contrary, it conceded that "[t]he denial of a hearing even to an arriving alien is, in practice, an extraordinary measure" and was reserved for instances in which disclosure of information would be harmful to the national interest. *Knauff* Brief at 9. In that respect, its argument was consistent with a different and well understood form of inherent executive authority: the power to protect the secrecy of confidential

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[8] Although the case was decided in 1950, the Court noted that "the national emergency" declared in 1941 had not been terminated, and that "a state of war still exists." *Id.* at 546.

information. *See, e.g.*, *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

Third, to the extent the Court in *Knauff* suggested that the President has authority apart from that delegated by Congress to exclude aliens, that suggestion has never been made before or since. Rather, the great weight of authority both before and after *Knauff* makes clear that Congress has *exclusive* power to set policy governing the admission of foreigners. *See Chy Lung*, 92 U.S. at 280; *Fong Yue Ting*, 149 U.S. at 713; *Galvan*, 347 U.S. at 531; *Arizona*, 567 U.S. at 399; *see also* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 Yale L.J. 458, 478 (2009) ("the Court never again came close to making as bold a statement in support of inherent authority as its undefined elaboration in *Knauff*").

2. *Congress has not delegated sweeping exclusion authority by statute*

The government's view that Sections 1182(f) and 1185(a)(1) have delegated sweeping authority to the President to exclude broad classes of foreigners is likewise untenable. To begin with, that view is incompatible with Congress's history of maintaining close authority over which classes of aliens are excludable. From the time of the Founding through the nineteenth century and the first half of the twentieth century, Congress set precise rules governing restrictions on immigration. When it delegated authority to the executive branch, it did so with measured precision, reserving broader delegations only to times of war or

emergency. *See supra* at 11-14; Hawaii Br. 38. But under the government's view, Congress in 1952 abruptly departed from this unbroken history and gave the President the prerogative to exclude entire nations based on his own unreviewable judgments about "the interests of the United States." Moreover, the government's view posits that Congress gave the President this vast new authority not by creating a new statutory mechanism that requires any particular findings or procedures, but by altering a wartime provision to become an all-purpose exclusion authority wielded unilaterally by the President. That is implausible. As this Court has repeatedly explained, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (it is "highly unlikely" that Congress would delegate significant authority absent a clear statement).

Moreover, the Court should avoid a construction of the law that "would make such a sweeping delegation of power that it might be unconstitutional." *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (plurality op.) (internal quotations omitted). The government's arguments if accepted by this Court would effectively obliterate the role that the Constitution assigns to Congress—and Congress alone—for regulating the admission of foreigners. The President's discretion, in the government's view, is

unbounded: He does not have to articulate any detailed findings; his proclamations can have an indefinite duration; and no exigency is required. U.S. Br. 35, 40-43. Wielding Sections 1182(f) and 1185(a), the President could decree that limitless classes of foreigners are excludable for all manner of reasons deemed "detrimental to the interests of the United States." *See* U.S. Br. 35-37 (disclaiming limitations on the President's authority). He could exclude foreign journalists if he finds their presence is disruptive to the public order; engineers if he finds they will take American jobs; individuals with disabilities if he finds that their accommodations will cost taxpayers money; or nationals of any particular country if he finds that the resulting diplomatic pressure could be advantageous in pursuing other foreign policy goals. And, of course, the government additionally claims that all such proclamations would be unreviewable in any court. U.S. Br. 18-26.

This view of executive authority is alien to our constitutional system and to the very rule of law. Congress, not the President, is empowered to make laws governing immigration. Although the President may exercise discretion in enforcing those laws, he cannot singlehandedly and with unreviewable discretion exclude broad classes of foreigners. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker * * * * And the Constitution is neither silent nor equivocal about

who shall make laws which the President is to execute.").

3. The Proclamation violates Congress's express will

Finally, the Proclamation is in open violation of Section 1152(a)(1)(A), which prohibits nationality-based discrimination in the issuance of immigrant visas. *See* Hawaii Br. 53-61. It contravenes Congress's determination that such prohibitions or restrictions undermine our Nation's values and insult the dignity of foreigners and Americans alike. Because the Proclamation is "incompatible with the expressed or implied will of Congress," the President's "power is at its lowest ebb." *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring). "[H]e can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Ibid.* Those residual powers do not exist—because Congress, not the President, has authority to set immigration policy.

The portions of the Proclamation banning entry under non-immigrant visas are likewise invalid because they contradict the "implied will" of Congress. *Ibid.* Congress sought to eradicate nationality-based discrimination against foreigners who seek to come to our Nation's shores. It would make little sense for Congress to have banned such discrimination against immigrants wishing to live here permanently while permitting it against students and visitors.

Tellingly, even the government sees the untenable implication of its arguments. It states, unconvincingly,

that its conception of the President's authority "does not mean that the President could use Section 1182(f) or 1185(a)(1) to revive the quota system." U.S. Br. 52. It is not at all clear why. The government says only that such an action "would contradict Section 1152(a)(1)'s core purpose." *Ibid.* That is certainly true, but the same could be said here: Section 1152(a)(1) was designed to eliminate nationality-based discrimination in our nation's immigration laws, yet the Proclamation enacts that very form of discrimination against nationals from multiple countries. If instead the government means to say that the Proclamation is nonetheless justified because it is based on "particularized risk factors," *ibid.*, then the government's true argument is that the President *could* reconstitute a quota system unilaterally so long as he finds that maintaining a quota serves a security purpose. Indeed, he could exclude citizens of entire nations if he finds that they possess dangerous or undesirable tendencies. *Cf. Chae Chan Ping*, 130 U.S. at 595 (describing "findings" made in California's constitutional convention that Chinese migrants "had a baneful effect upon the material interests of the state, and upon public morals").

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"The executive action we have here originates in the individual will of the President and represents an exercise of authority without law. No one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance[.]" *Youngstown*, 343 U.S. at 655 (Jackson, J., concurring). So too here. This Court should not sustain such an unbounded use

of executive authority that admits of no limiting principle and contradicts our Nation's core values.

II. THE PROCLAMATION VIOLATES THE ESTABLISHMENT CLAUSE AND HARMS MEMBERS OF ALL FAITHS

The Proclamation is unlawful for an additional, even more fundamental reason: it discriminates against Muslims in violation of the Establishment Clause. The Proclamation thereby harms not only members of the Muslim faith, but members of all faiths.

A. The Proclamation Targets And Harms Muslims

The Proclamation is clearly intended to do what the Establishment Clause of the First Amendment forbids: target members of one faith, Islam.

The Nation's commitment to religious freedom and non-discrimination is firmly woven into our fabric and our constitutional system. The government is prohibited from favoring a particular religion over others and from singling out any religion for censure. The Establishment Clause "forbids an official purpose to disapprove of a particular religion or of religion in general." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993); *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to

confess by word or act their faith therein."). "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982).

This Court has long recognized that efforts by the government to favor one religion "inevitabl[y] result" in incurring "the hatred, disrespect and even contempt of those who h[o]ld contrary beliefs." *Engel v. Vitale*, 370 U.S. 421, 431 (1962). Such acts send messages to members of minority faiths "that they are outsiders, not full members of the political community." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

Amici, both as faith and interfaith leaders and as members of faiths that have experienced religious persecution, are unfortunately familiar with the history of religious minorities who have faced discrimination and exclusion from the United States based on stereotypes and stigma. One of the most infamous instances occurred in 1939, when a ship carrying more than 900 Jewish men, women, and children fleeing Nazi Germany was turned away from U.S. shores. Many in the United States wrongly suspected that these Jewish refugees were threats to national security. The ship was forced to return to Europe, and more than a quarter of its passengers perished in the Holocaust. *See* Daniel A. Gross, *The U.S. Government Turned Away*

Thousands of Jewish Refugees, Fearing That They Were Nazi Spies, Smithsonian.com (Nov. 18, 2015).[9]

Our history shows that laws that are written to appear neutral on the basis of religion may actually have been designed as tools of religious persecution. Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U. L. Rev. 221, 223 (1993). For example, the large influx of Catholic immigrants in the mid-nineteenth century led to anti-Catholic riots, burnings of Catholic churches, beatings of Catholic students who refused to use the King James Bible, and the rise of nativist political movements that campaigned to restrict immigration by Catholics. *See* Michael W. McConnell, *Is There Still a "Catholic Question" in America? Reflections on John F. Kennedy's Speech to the Houston Ministerial Association*, 86 Notre Dame L. Rev. 1635, 1639 (2011). Amidst the furor, the Ku Klux Klan and other nativist groups secured the enactment of a law requiring all children to attend public schools, effectively shuttering Catholic schools. Laycock, 1993 B.Y.U. L. Rev. at 223-224. Similarly, Mormons were persecuted in the nineteenth century as they were driven off their lands and forced to flee across the country. *Id.* at 223. Among the tools of persecution were neutral-sounding laws enacted to target Mormons, which required voters to take anti-polygamy oaths as a condition of their right to vote. *Id.* at 223-224.

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[9] http://www.smithsonianmag.com/history/us-government-turned-away-thousands-jewish-refugees-fearing-they-were-nazi-spies-180957324/.

The Proclamation and the executive orders that preceded it have similarly been couched in neutral-sounding terms, imposing bans on most or all nationals from six predominantly Muslim countries. Yet Amici understand these orders for what they are: official acts of discrimination on the basis of religion. As the Court of Appeals for the Fourth Circuit has forcefully concluded, the Proclamation's primary purpose is to discriminate against Muslims. *Int'l Refugee Assistance Proj. v. Trump*, 883 F.3d 233, 263-270 (2018) ("*IRAP*"). The Proclamation and the prior orders are consistent with President Trump's call as a candidate for "a total and complete shutdown of Muslims entering the United States until our representatives can figure out what is going on." App. 162. This call for a "Muslim ban" was repeated throughout the 2016 Presidential campaign, accompanied by further statements from then-candidate Trump that "Islam hates us" and that "we're having problems with the Muslims." App. 164. The proposed "Muslim ban" later morphed into a plan to "look[] * * * at territories" and impose nationality-based travel restrictions. App. 179. The President, upon signing the predecessor version of the Order, stated that it was meant to protect the Nation from entry by foreign terrorists—and then explained, "We all know what that means." App. 124. It is likewise plain to members of the faith community that a desire to exclude Muslims motivated the issuance of this Proclamation.[10]

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[10] Indeed, the first executive order was not even neutral on its face. It invoked the specter of "honor killings," which is a coded term that reinforces the stigmatization of Muslims as violent and backward. Exec. Order 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

In addition to its discriminatory intent, the Proclamation directly harms Muslims who are constitutionally entitled to practice their faith in the United States. The Proclamation and its predecessors have disrupted the lives of Muslim Americans who fear that they are being targeted for exclusion and could face separation from their families. *See, e.g.*, Neil Munshi, *Muslim Americans Express Anxiety Over Trump Travel Ban*, Financial Times (Feb. 2, 2017);[11] *see also* Faiyaz Jaffer, *The Travel Ban Has Been Particularly Harsh on Shiite Muslims*, Gazette (May 26, 2017) (describing a college student who feared that, if he went to say his final goodbyes to a dying relative in Iran, he might be unable to return to the United States to study).[12]

The three orders have separated couples engaged to be married and caused family members to miss weddings of their loved ones, as well as births and deaths—key moments in the personal and religious life of a faith community. *See* Jack Healy & Anemona Hartocollis, *Love, Interrupted: A Travel Ban Separates Couples*, N.Y. Times (Feb. 8, 2017);[13] Ed Pilkington, *Trump Travel Ban Crackdown Turns Wedding Celebration Into a Family Separation*, The Guardian

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[11] https://www.ft.com/content/ba9f2d88-e905-11e6-893c-082c54a7f539?mhq5j=e2.

[12] http://gazette.com/the-travel-ban-has-been-particularly-harsh-on-shiitemuslims/article/1603972.

[13] https://www.nytimes.com/2017/02/08/us/love-interrupted-a-travel-banseparates-couples.html.

(Apr. 14, 2017).[14] The Proclamation and its predecessors have interfered with religious practice and community by barring prominent Muslims with citizenship in the affected countries from fulfilling long-planned speaking engagements at conferences, religious services, festivals, and universities in the United States. *E.g.*, *IRAP*, 883 F.3d at 282 (Gregory, J., concurring); *Aziz v. Trump*, 234 F. Supp. 3d 724, 728 (E.D. Va. 2017).

The orders have also harmed all American Muslims at a profoundly deeper level. They have ostracized those who simply want to practice their faith freely and live peacefully as neighbors, students, colleagues, families, and members of their communities. They have contributed to an environment in which Muslims are increasingly subject to violence, harassment, and discrimination because of their faith. This is borne out by recent hate crimes that have been perpetrated against Muslims[15]—or people *perceived* to be Muslims.[16] Indeed, an FBI report on hate crimes

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[14] https://www.theguardian.com/us-news/2017/apr/14/trump-travel-ban-visairan-wedding.

[15] *See* Nancy Coleman, *Mosques Targeted in 2017*, CNN.com, http://www.cnn.com/2017/03/20/us/mosques-targeted-2017-trnd/index.html (last visited Mar. 28, 2018). The map, which contains data from January through July 2017, describes 63 reported incidents of attacks against mosques, including suspected arson and spray-painting of anti-Muslim epithets. *See also, e.g.*, Bill Lindelof, *Two Suspected Hate Crimes in Less Than Two Weeks at Davis, Roseville Mosques*, Sacramento Bee (Feb. 1, 2017), http://www.sacbee.com/news/local/ crime/article130135154.html.

[16] *See* Daniel Victor, *Three Men Stood Up to Anti-Muslim Attack. Two Paid With Their Lives*, N.Y. Times (May 28, 2017)

showed that while hate crimes have risen by six percent overall, hate crimes motivated by anti-Islamic bias increased by 26.5 percent in 2016.[17]

That the Proclamation's proffered justification was based on the threat of terrorism makes it all the more pernicious. Conflating "Muslims" with "terrorists" obscures the fact that most victims of terrorism are themselves Muslims. National Counterterrorism Center, 2011 Report on Terrorism at 14.[18] Attempts to justify the Order based on the threat of terrorism—and to treat populations of entire Muslim-majority countries as potential terrorists—only compound anti-Muslim vilification.[19] Were this Court to sustain the Proclamation's validity despite such clear evidence of animus and harm to Muslims, it would send a message

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(describing stabbing victims' efforts to intervene when a man shouted anti-Muslim insults at two women in Portland, Oregon, and noting that one of the women is not Muslim), https://www.nytimes.com/2017/05/28/us/portland-stabbing-victims.html.

[17] *Compare* FBI, 2016 Hate Crime Statistics, Table 1 (7,321 total offenses and 381 anti-Islamic offenses), https://ucr.fbi.gov/hate-crime/2016/tables/table-1, *with* FBI, 2015 Hate Crime Statistics, Table 1 (6,885 total offenses and 301 anti-Islamic offenses), https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf.

[18] https://fas.org/irp/threat/nctc2011.pdf.

[19] For example, amici national security experts supporting the government assert that the objective of screening out "sharia supremacists" cannot be achieved "without subjecting Muslim aliens to more-extensive inspection" and that the Proclamation serves the "national security policy goal" of establishing "a screening system that in large measure vets for *Islamic radicalism*." Br. of National Security Experts in Support of Petitioners at 12-13 (emphasis in original).

that religious-based discrimination is tolerable so long as it is framed in a way that appears superficially neutral toward religion. It would provide an Establishment Clause-evading roadmap for governments at all levels that wish to enact policies disfavoring Muslims or adherents of any other faith. And it would have the potential to further fan the flames of anti-Muslim sentiment, signaling to the public that anti-Muslim hatred is not only tolerated but sanctioned by the government. *Cf.* Laycock, 1993 B.Y.U. L. Rev. at 223 (describing outburst of private violence against Jehovah's Witnesses after this Court's decision upholding a requirement to salute the flag).

B. Singling Out Members Of One Faith Erodes Core Constitutional Principles Critical To The Exercise Of All Faiths

In contrast with many other countries, where conflict inspired by religious views has at times led to upheaval and suffering, the United States has generally strived for peaceful co-existence among religions. "It was in large part to get completely away from * * * religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion." *Engel*, 370 U.S. at 433. As a result of those guarantees, the United States today is a country of vibrant religious beliefs, practices, and communities in which faith continues to play an important role in most Americans' lives.

Thus, the harm caused by singling out members of one religious faith is not restricted to the disfavored

sect; it harms all religious groups by eroding core principles that have allowed a multitude of faiths to coexist and to thrive. Protections for the free exercise of religion are critical to "vindicat[e] this nation's long-held aspiration to serve as a refuge of religious tolerance." *Hobby Lobby*, 723 F.3d at 1153 (Gorsuch, J., concurring); *see Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014) (official efforts to "denigrate * * * religious minorities" violate the Establishment Clause). By both protecting the free exercise of religion and prohibiting the government from favoring or disfavoring any one religion, the First Amendment "seek[s] to avoid * * * divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike." *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring).

Affirming the judgment below is essential to not only protect Muslims from discrimination but to ensure religious liberty for members of all faiths.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed, and the Proclamation should be held unlawful in its entirety.

Respectfully submitted,

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